

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, NASHVILLE RESIDENT OFFICE

JOHNSTON FIRE SERVICES LLC

And

Case No. 10-CA-175681

Case No. 10-CA-177542

Case No. 10-RC-17738

ROAD SPRINKLERS FITTERS LOCAL UNION 669

REPLY IN SUPPORT OF MOTION FOR PERMISSION TO FILE UNTIMELY

Comes the Respondent (“Respondent”) and for its Reply in Support of its Motion for Permission to File Untimely, states as follows:

The Charging Party does not identify any prejudice that would result from allowing Respondent to file untimely. Instead, the Charging Party argues that these circumstances do not constitute “excusable neglect”.

The Charging Party argues that “miscalculation of a filing date, absent a showing of extenuating circumstances, does not constitute ‘excusable neglect’” citing *In Re Int’l Union of Elevator Constructors*, 337 NLRB 426 (2002). There, the Board stated,

We have decided to correct this today by expressly overruling *Postal Service* and clarifying the Board's policy. The Board's Rules, at Section 102.111, describe in specific detail how to count or compute the days in establishing the due date. Henceforth, a late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date. Additionally, in all matters raising excusable neglect issues we will strictly adhere to our rule that the specific facts relied on to support the motion to accept a late filing shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. Failure to submit the facts in an affidavit will result in rejection of the Motion.

In Re Int'l Union of Elevator Constructors, 337 NLRB at 428.¹ This is not a case involving the miscalculation of a filing date, or failure to file an affidavit with the motion seeking permission for an untimely filing. Therefore, the holding in *In Re Int'l Union of Elevator Constructors* is not applicable to these facts.

In *In Re Int'l Union of Elevator Constructors*, the Board approved of the United States' Supreme Court's definition of "excusable neglect" in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 382, 113 S. Ct. 1489, 1491, 123 L. Ed. 2d 74 (1993). Of the Supreme Court's opinion, the Board stated,

It concluded that a determination whether neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These circumstances included the danger of prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

In Re Int'l Union of Elevator Constructors, 337 NLRB at 427.

In *Pioneer*, the Supreme Court concluded "that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. The Supreme Court rejected a strict definition of "excusable neglect" that required a party and its counsel to be without fault, stating,

Under petitioner's view, any showing of fault on the part of the late filer would defeat a claim of 'excusable neglect'... We think that petitioner's interpretation is not consonant with either the language of the Rule or the evident purposes underlying it... The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to *especially through carelessness*." Webster's Ninth New Collegiate Dictionary 791 (1983). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.

Pioneer, 507 U.S. at 388 (emphasis original to *Pioneer* Court).

¹ There, the Board permitted the late filing at issue due to confusion and the perception of ambiguity with respect to its past decisions and practice.

In *Pioneer*, the Supreme Court affirmed the Court of Appeals determination that the “*Dix* factors” were helpful but not exhaustive in evaluating the circumstances to determine the presence of excusable neglect. *See Pioneer*, 507 U.S. at 385, 386. Those factors include, “(1) whether granting the delay will prejudice the other parties; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the [neglectful party] acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect.” *See Pioneer*, 507 U.S. at 385.

Here, no opposing party has identified any prejudice. With respect to the first factor, given the approved extensions of time provided to the other parties in this matter and the fact that Respondent has previously requested no extensions, there is no delay that will negatively impact the NLRB’s timely and efficient resolution of this matter. With respect to the second factor, the answering brief² was ultimately filed only five calendar days and three business days late, which is less than the amount of time that would have been permitted if a timely motion for an extension had been filed and granted. Furthermore, efficient administration necessitates hearing Respondent’s reasons to uphold the ALJ’s decision. With respect to the third factor, the delay was beyond the *reasonable* control of Counsel responsible for filing the answering brief and Counsel exercised good faith in trying to meet the filing deadline. Counsel directed Counsel’s staff to appropriately calendar the deadline for the answering brief. Counsel believed that it was reasonable to expect Counsel’s staff to comply with Counsel’s direction or alert Counsel of the inability to do so. With respect to the fifth factor, Respondent is not responsible for causing or contributing to the mistake of Counsel and failure of Counsel’s staff.

² The answering brief responded to 29 Exceptions and a 21 page supporting brief.

As an additional factor, the untimely filing is an answering brief that explains the basis for upholding the well-reasoned decision of an Administrative Law Judge in this matter. The General Counsel did not challenge the ALJ's decision. However, the Charging Party challenged that decision and sought the Board's review of such decision. It is in the Board's interest and the interests of efficient administration and justice to have the benefit of the information, law, analysis and arguments contained in Respondent's brief.

In this case, just as in *Pioneer*, there is no "evidence of prejudice to [opposing parties] or to judicial administration in this case, or any indication at all of bad faith..." *Pioneer*, 507 U.S. at 398-99. Therefore, the Board should find excusable neglect in this instance.

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that the Board grant Respondent's motion for permission to file an untimely answering brief to the Charging Party's Exceptions to the Administrative Law Judge's Decision.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed on May 19, 2017 utilizing the National Labor Relations Board's E-Filing system, resulting in timely service of same, and was otherwise served via electronic mail upon the following:

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DATED this 19th day of May, 2017

/s/David L Kelly

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